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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. NORBERT MANALISAY CRUZ, Defendant and Appellant.	2d Crim. No. B276536 (Super. Ct. No. 1356795) (Santa Barbara County)

Norbert Manalisay Cruz appeals after a jury convicted him on two counts of sexual acts with a child 10 years of age or younger (Pen. Code,[1] § 288.7, subd. (a)), four counts of oral copulation or sexual penetration of a child 10 years of age or younger (*id.*, subd. (b)), and one count of aggravated sexual assault upon a child under the age of 14 (§ 269, subd. (a)(5)). The trial court sentenced him to a total of 125 years to life in state prison. Appellant contends the court erred in excluding evidence offered to impeach the victim. We affirm.

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[1] All statutory references are to the Penal Code unless otherwise stated.

STATEMENT OF FACTS

Prosecution

Jane Doe was born in 2001. In 2008, Doe and her 11-year-old brother Anthony were taken into protective custody and placed together in foster care. In March 2009, Doe and Anthony were placed with Ruth Zarate and her husband. Several months later, the children began living with appellant and his wife. Alfredo (another foster child who was a year older than Doe) and appellant's infant son also lived in the home.

Late one night in April 2009, Doe woke up and went to talk to appellant in the garage. Appellant picked her up and put her on top of a freezer. He told her that he wasn't touching her but was "going to make [her] feel better." Appellant pulled down his pants and underwear before pulling down Doe's pajama pants and underwear. He spit on his erect penis and inserted it in her vagina. Several minutes later he withdrew his penis and ejaculated onto the floor. Appellant told Doe not to tell anyone what had happened or he would go to jail.

Appellant continued his assaults on Doe in the garage at night. Sometimes he forced her to orally copulate him and told her to "[s]uck it like it's a lollipop." On more than five occasions, he orally copulated her. On another occasion, appellant sexually penetrated Doe while she was home sick from school. On two other occasions, he entered her room while she was asleep and had sex with her. Doe estimated that appellant sexually assaulted her more than 20 times over a 2-year period. She did not tell any adults about the abuse because she was afraid appellant would go to jail and then come after her. She did tell her friends, who said "it was nasty."

In August 2011, Doe was removed from appellant's home and resumed living with Zarate and her husband. About a month

later, Doe noticed that Zarate was reading something and asked her what it was. Zarate said she was reading training materials on how to help foster children who have been sexually abused.

A few days later, Doe told Zarate "do you remember what you were reading about. Something happened to me, but it's not something that I have told anyone." Zarate replied, "you can trust me. You can tell me anything, I'm here to help you out." Doe then fearfully and anxiously recounted what appellant had done to her. Zarate told Doe that appellant had raped and sexually abused her and urged her to write everything down. Doe began a journal that same day.[2]

The next morning, Zarate called the Family Care Network to report the allegations. Doe was interviewed by her assigned social worker and an investigation social worker. Santa Barbara Child Protective Services subsequently notified the police of the allegations.

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[2] In her first journal entry, Doe wrote: "Norbert he abused me every day, almost every day. I don't really understand that part. . . . [He] told me I was pretty. One thing – number 1. When I got to his house that night I want milk with cookie and he would make out with me. Number 2. The first time he would just put his weenie in my vagina. I felt like I was an adult. Number 3. After a few days he started sucking on my boobies which I didn't like. I was the adult who was having a baby. Number 5 [*sic*]. He would make me suck on his weenie. Number 6. He would lick on my vagina. It felt like I was taking a nasty shower. Number 7. He used to put me on top of the freezer. . . . Number 9 [*sic*]. [¶] . . . [¶] . . . Before I could ask him if he ever did that to his daughter or other girls he said no. Number 10. He told me that this thing that comes out that's white was for having babies only. [¶] . . .[¶] He used to make me or him [*sic*] spit on the private."

In October 2011, Doe underwent a sexual assault exam. Although the exam neither confirmed nor negated sexual abuse, it was consistent with the history Doe provided to the examiner. Doe subsequently gave a recorded police interview. Aside from being more detailed, her account of appellant's abuse was virtually identical to her trial testimony.

After the interview, Doe agreed to participate in a pretext phone call to appellant. During the call, appellant denied any wrongdoing and said he needed to talk to Doe with a social worker present. Appellant also told Doe "you cannot be saying things like that" and that "we're all gonna get in trouble" if she did not "stop" doing so.

Shortly after the phone call, the police went to appellant's house and he agreed to be interviewed at the police station. Santa Maria Police Detective Steven Ridge conducted the interview while Detective Michael Huffman monitored it from another room. Appellant initially denied any sexual contact with Doe. At one point, Detective Ridge falsely told appellant that semen had been recovered from Doe's pajamas and asked whether appellant's DNA would be found. Appellant replied, "sir, I hope not" and claimed that he had erectile difficulties.

Toward the end of the interview, Detective Huffman entered and falsely said that physical evidence implicating appellant had been found. Detective Ridge falsely added that the police were at appellant's house collecting evidence. Detective Huffman told appellant he was going to be labeled either as a pedophile or sociopath or as someone who had simply made a mistake. Appellant replied that he was not a pedophile but had made a mistake touching Doe. He acknowledged smelling someone's underpants and ejaculating into clothing, but claimed he did not know whether Doe was present when he did so. He

eventually admitted that he had once entered Doe's bedroom, touched her vagina, and ejaculated. He also admitted touching Doe in the garage and ejaculating. He denied any penetration, yet acknowledged that his penis may have rubbed against Doe when her underwear was off. He said "I'm guilty" and added "if I need to be prosecuted, . . . I think it's – it's time, you know, because that was wrong, touching a child."

Doe also recounted having sexual intercourse with Alfredo while she was living with appellant. Doe wanted to have sex with Alfredo because appellant was having sex with her and she thought it was normal. Alfredo tied Doe to the bed during their sexual encounters. Alfredo also had discussions with Doe about sex that included explanations of erections and sperm. Alfredo never had oral sex with Doe and never ejaculated during their encounters. According to Doe, Anthony had watched Alfredo have sex with her. She never told anyone about this conduct because she was afraid she would get in trouble. Although Doe initially told Detective Huffman that no one other than appellant had molested her, she told Zarate about Alfredo's abuse a few days after her initial disclosure about appellant.

Defense

Appellant testified in his defense. He denied any sexual contact with Doe and claimed that his statements to the contrary had been coerced.

Detective Ridge interviewed Doe after she reported the sexual conduct with Alfredo. Doe told the detective that Alfredo would tie her wrists to the bed with string, take off their pants but not their underwear, get on top of her, and "go up and down." She told Alfredo that she did not want him to do it and told him several times to stop. She asserted that Alfredo had never put his penis in her vagina or any other orifice.

Dr. Richard Leo, a psychology professor, testified as an expert regarding false confessions due to improper police interrogation tactics. Dr. Leo offered no opinion whether appellant's confession was the result of such tactics.

Dr. Jeffery Davis, a psychologist who evaluates sex offenders at Coalinga State Hospital, conducted an evaluation of appellant. Appellant scored in the low and very low range on a checklist that has some predictive value with sex offenders. Dr. Davis also found no characteristic indications of pedophilia and noted it was unusual for someone to be 42 years old, like appellant, yet have no history or prior indication of pedophilia.

Appellant also presented 12 witnesses who attested to his good character. One of the witnesses, appellant's daughter, testified that Doe competed for the attention of appellant's wife. Appellant's neighbor Aurelia Vega, who briefly had custody of Doe after she left Zarate's house, testified that Doe tended to lie about small things like being hit. Vega also testified that she never left Doe unattended because she was afraid of what she might say happened in her absence.

DISCUSSION

Appellant contends the court violated his constitutional rights to due process and a fair trial by excluding evidence impeaching Doe. We disagree.

We review trial court rulings on the admissibility of evidence for abuse of discretion. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.) Accordingly, we will not disturb such rulings unless the appellant shows the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Ibid.*) The same standard applies to our review of a court's decision to exclude evidence

under Evidence Code section 352. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

During the trial, the court granted the prosecution's motion for an Evidence Code section 402 hearing regarding the admissibility of evidence of prior sexual conduct between Doe and Alfredo. The prosecution asserted that appellant should be barred from arguing that the prior conduct was a false accusation.

At the hearing, Doe testified that she told Zarate Alfredo had looked under her shirt and engaged her in sexual intercourse on numerous occasions. Doe also said that Alfredo and her brother Anthony would enter her bedroom and tie her to the bedposts with string. Afterward, Anthony watched Alfredo have intercourse with her. The court accepted an offer of proof that in another interview, Doe said that Alfredo tied her up, took off their pants but kept on their underwear, got on top of her and went "up and down." Doe also said, contrary to her other accounts, that Alfredo never sexually penetrated her.

When the defense called Alfredo to testify, he invoked his privilege against self-incrimination and declined to answer any questions about engaging in sexual activity with Doe. Anthony, who was 18 at the time, testified that he never went into Doe's bedroom with Alfredo or helped or watched him tie her to the bed with strings. Anthony also denied ever seeing Alfredo have sex with Doe or engage in "dry humping" with her. Anthony did see Alfredo and Doe playing with strings and "making out" a few times on Doe's bed, but he left the room after seeing this. Anthony acknowledged that he and Alfredo were close friends when they lived together.

At the conclusion of the hearing, defense counsel asserted that Doe's testimony and statements regarding Alfredo having

intercourse with her were admissible as a false complaint or to impeach her. The prosecutor responded that there was no evidence Doe's accusation was false and that to prove its falsity would require confusing testimony from several witnesses. The prosecutor conceded, however, that the evidence was admissible to prove that Doe learned what she knew about sex from Alfredo, not appellant, as provided in *People v. Daggett* (1990) 225 Cal.App.3d 751, 757 (*Daggett*).

The court agreed with the prosecution's theory of admissibility. After considering whether the jury should make the determination whether Anthony's testimony established that Doe's testimony about Alfredo was false, the court posited that such a finding would "eviscerate[] the *Daggett* theory."

The court ultimately concluded that the evidence was admissible pursuant to *Daggett* and that this theory of admissibility "is premised on the credibility and truth of the victim's testimony regarding the prior incident," while admitting the evidence for its falsity would "undermine[] the foundation for the admissibility" in that "one theory refutes another." The court also found that the evidence was insufficient to support a finding that Doe's accusations against Alfredo were false. In support of this finding, the court noted that Doe's accusations were consistent with her testimony and her prior statements, the accusations were partially consistent with Anthony's testimony, and Anthony had a possible motive to deny being present when the purported acts occurred. The court further found that even if there was sufficient evidence of falsity, the evidence would be excluded as more prejudicial than probative under Evidence Code section 352 because its admission would result in an undue consumption of time and confuse the issues for the jury.

Appellant contends the court erred in excluding Anthony's testimony that he never witnessed Alfredo having sex with Doe and never helped Alfredo tie her to the bed with string. He claims that "given Anthony's hearing testimony, Doe's allegations regarding Alfredo and Anthony were *demonstrably* false. By excluding this proof, Doe was improperly cloaked in a false aura of veracity, and appellant deprived of constitutionally significant impeachment evidence[.]"

Anthony's hearing testimony plainly contradicted Doe's testimony in some respects. Even assuming, however, that the evidence was otherwise relevant and admissible to impeach Doe, the court did not abuse its discretion in excluding it under Evidence Code section 352. Among other things, the evidence was cumulative. At the Evidence Code section 402 hearing, the court accepted an offer of proof that Doe had stated in another interview that Alfredo never had sex with her. Detective Ridge testified at trial regarding these contradictory statements. The detective subsequently testified that Doe had stated—contrary to what she had told Zarate—that she was not receptive to Alfredo's advances and repeatedly told him to stop. Because appellant "received the essence of what he needed for impeachment purposes" from Doe's own contradictory statements, the evidence of Anthony's denials was properly excluded. (*Daggett*, *supra*, 225 Cal.App.3d at p. 760.)

Moreover, any error in excluding the proffered evidence was harmless. Contrary to appellant's claim, application of the ordinary rules of evidence generally does not implicate due process or other state or federal constitutional concerns. (*People v. Riccardi* (2012) 54 Cal.4th 758, 809, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Appellant offers no persuasive reason why we should find an

exception here. Accordingly, any error in excluding the evidence must be deemed harmless unless it is reasonably probable that appellant would have achieved a more favorable result had the evidence been admitted. (*Ibid*; *People v. Watson* (1956) 46 Cal.2d 818, 836.) That standard is not met here. As we have noted, the proffered impeachment evidence was cumulative. Perhaps more importantly, appellant confessed to many of the acts of which he was convicted. In light of this evidence, it is not reasonably probable that appellant would have achieved a more favorable result but for the exclusion of cumulative evidence tending to prove Doe may have lied about or exaggerated sexual conduct with a third party. (*Riccardi*, at p. 809; *Watson*, at p. 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Gusatavo Lavayen, Judge
Superior Court County of Santa Barbara

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.